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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 647

ARTHUR T. GALT and IDA COOK GALT,
Petitioners,

vs.

THE DEPARTMENT OF PUBLIC WORKS AND BUILDINGS OF THE STATE OF ILLINOIS FOR AND IN BEHALF OF THE STATE OF ILLINOIS.

PETITION FOR WRIT OF CERTIORARI.

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Arthur T. Galt and Ida Cook Galt, who were defendants in the trial court, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois en-

tered in this cause on November 27, 1950 (R. 209-210) which became final by denial of a rehearing January 15, 1951 (R. 222).

Opinions Below.

The majority opinion (R. 199-208) and the dissenting opinion of Mr. Justice Gunn (R. 208-209) are reported as *Department of Public Works* v. *Chicago Title and Trust Co.*, 408 Ill. 41, 54, 95 N.E. 2d 903, 910.

Jurisdiction.

The judgment of the Supreme Court of Illinois having become final on January 15, 1951, is by this petition sought to be reviewed within three months of its becoming final under the general certiorari statute, 28 U. S. Code, Section 1257 (3), as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> " * * *
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Questions Presented.

(1) Whether the Supreme Court of Illinois properly held that the constitutionality under the Federal Constitution of Section 2 of the State Parks Act of Illinois (R. 186-187; Ill. R.S. 1949, Chap. 105, "Parks", par. 466; also set forth in the Appendix) was not properly preserved for review in the Supreme Court of Illinois.

(2) Whether Section 2 of the State Parks Act is invalid under the due process clause of the Fourteenth Amendment, because vague and indefinite in laying down the requirements justifying the taking of a landowner's property by the process of eminent domain.

(3) Whether the holding that the Amended State Parks Act was such a valid delegation of legislative authority as excused a specific enabling statute constitutes a violation of the due process clause of the Fourteenth Amendment.

STATEMENT OF THE CASE.

This suit was brought by the Illinois Department of Public Works and Buildings in the Circuit Court of Lake County, Illinois, to condemn for state park purposes three separate tracts containing approximately 290 acres of land north of Waukegan, Illinois.

Petitioners are the owners of an undivided half interest in the three tracts and contested the right of the State to condemn the land under Amended Section 2 of the State Parks Act mentioned above.

The original petition filed by the Department on November 23, 1946 (R. 1) sought to condemn only one of the tracts, 207 acres in area. Petitioners' motion to dismiss this petition (R. 5) resulted in the Department's filing an amendment (R. 5-8) to the original petition which added the two additional tracts and considerably amplified the original petition by describing for the first time alleged plans of the Department for an "Illinois State Beach Park" on Lake Michigan between Waukegan, Illinois, and the Wisconsin state line (R. 6). The amendment alleged that the purpose of the petitioner was to set aside and develop the land as a state park, and alleged [in statutory language hereinafter noticed further] that the land has "unusual scenic attractions caused by geological and topographic formations such as canyons, gorges, caves, dunes, beaches, moraines, palisades and various points of scientific interests both to botanists and naturalists" (R. 6).

To this amended petition the present petitioners interposed a motion to dismiss (R. 12-13) which is relied upon here as preserving for review the constitutional question raised by the present petition, even though the Supreme Court of Illinois refused to pass on the question (R. 205).

Among the grounds of dismissal asserted were the following (R. 12-13):

> (6) The petition does not set forth sufficient allegations to show any statutory authority for the taking of defendants' land.
>
> (12) Condemnation of defendants' property is the taking of property without due process of law and contrary to the fifth amendment of the Constitution of the United States.
>
> (16) The amendment to Section 2 of an Act in relation to the acquisition, control, etc. of State Parks approved on July 3, 1931, was not properly passed and is null and void.

The motion to dismiss also traversed (R. 14) all allegations of fact in the petition, as amended.

At the hearing before the trial judge on this motion to dismiss it was shown that two tracts of the three tracts sought to be condemned contained no dunes, gorges, caves, beaches, moraines or palisades (R. 36). No proof was offered, as alleged in the petition (R. 2), that the legislature had appropriated any fund for the acquisition of the three tracts sought to be condemned.

Arguments made by counsel are not shown by the report of the proceedings on motion to dismiss (R. 38). The trial court denied the motion to dismiss (R. 38).

Under Illinois law, the right to condemn is determinable by the court and the only issue to be tried by the jury is the amount of compensation to be awarded—*Board of Education of Cicero-Stickney Township High School* v. *City of Chicago*, 402 Ill. 291, 298, 83 N.E. 2d 714, 718 (1949).

Consequently, the motion to dismiss is determinative whether the constitutional question was preserved.

A jury trial was thereafter held and the jury found a total value of $137,485.00 (R. 167) on the three tracts stipulated to be 293.69 acres in area (R. 131-132). This amount was a fraction of the valuation placed on the property by well-qualified expert witnesses of these petitioners.*

From a judgment on the jury's verdict, the petitioners appealed to the Illinois Supreme Court on grounds, among others (R. 169-171):

> That there was no act of the legislature establishing an Illinois Beach State Park or authorizing the Department to establish it and that taking petitioners' land before the park was established by law deprives the petitioners of their property without due process of law in violation of the Fourteenth amendment.
>
> That the 1931 amendment to the State Parks Act is unconstitutional and void under constitutional provisions, including the Fourteenth amendment, because it is vague, indefinite and uncertain; and
>
> That it was the duty of the trial court to dismiss the petition because the Department had no authority to condemn.

---

*The jury valued tract 1 containing 207 acres (R. 131) at $98,325.00 (R. 167); petitioners' witnesses valued it from $325,000.00 to $517,000.00 (R. 131, 137, 141, 146). The jury valued tract 2 of 38.11 acres (R. 132) at $7,622.00 (R. 167) against testimony of $8,527.50 and $12,000.00 (R. 143, 146). The verdict on tract 3 comprising 48.58 acres (R. 132) was $31,538.00 against testimony of $157,968.23 (R. 121) and $120,000.00 (R. 136). However, the verdict of the jury was within the range of all the evidence.

In addition, the petitioners sought a reversal because of errors in receiving evidence, rejecting evidence and instructing the jury.

The Supreme Court of Illinois, one judge (Walter T. Gunn) dissenting, affirmed the judgment. *Department of Public Works* v. *Chicago Title and Trust Co.*, 408 Ill. 41, 95 N.E. 2d 903. It held that section 2 of the State Parks Act as amended in 1931 (set forth in the appendix hereto) was a valid delegation of power to the Department of Public Works and Buildings "to purchase or acquire by condemnation proceedings * * * the title to all such lands, waters or regions, and the easements appurtenant or contributory thereto, which shall be in accord with such policy in respect to a system of State Parks, for the purpose of which the General Assembly may make an appropriation" (Ill. R.S. 1949, c. 105, "Parks", par. 466, R. 186-187). The court held that the absence of specific enabling legislation was not violative of the due process clauses of the State and Federal Constitutions.

The court refused to pass upon the petitioners' "contention that the State Parks Act is void and unconstitutional because the language which gives authority to condemn lands which have 'unusual scenic attractions' is vague, indefinite and uncertain" on the ground that no such question was presented to the trial court (408 Ill. 41, 50; R. 205).

Mr. Justice Gunn dissented in an opinion (408 Ill. 54, R. 208-209) denying that the legislature had "delegated to the Department of Public Works and Buildings the power to acquire land *which in its judgment has unusual scenic attraction* by eminent domain proceedings, when its acquisition has not been authorized by the State, and a specific appropriation made to pay for it," and further stating that the majority opinion "opens wide the door to acquir-

ing land for park purposes, *depending entirely upon the artistic predilections, or the historic inclinations* of the head of the Department." (Italics supplied.)

Petitioners filed their petition for rehearing (R. 213-221) asserting, among other grounds, that paragraph 2 of Section 2 of the State Parks Act, as amended in 1931, giving the Department the right to condemn lands based upon "unusual scenic attractions" violated the due process clause of the State Constitution and of the Fourteenth Amendment of the Federal Constitution. The petition for rehearing was denied (R. 222).

Specification of Errors.

The Supreme Court of Illinois erred:

(1) In holding that the petitioners failed to preserve for decision by the Supreme Court of Illinois petitioners' contention that the 1931 amendment to the State Parks Act was in violation of the Fourteenth Amendment of the Federal Constitution.

(2) In refusing to hold that the 1931 amendment to the State Parks Act was so vague as to violate the Fourteenth Amendment of the Federal Constitution.

(3) In holding that the amended State Parks Act was a valid delegation of legislative authority under the due process clause of the Fourteenth Amendment.

Reasons for Granting the Writ.

Summary.

I.

Under Illinois practice the authority of the Department to condemn the petitioners' property was properly challenged by the motion to dismiss the petition filed by the Department. The specifications in the motion to dismiss

(R. 13) were sufficient to challenge the constitutionality under the Federal Constitution of the State Parks Act upon which the Department based its petition. The specification that the condemnation of defendants' property "is the taking of property without due process of law" and contrary to the Fifth Amendment of the Constitution of the United States and the further specification that the amendment to Section 2 of the 1931 amendment was null and void were adequate statements that the 1931 amendment violated the due process clause of the Fourteenth Amendment. Under decisions previous to the present one such specifications have been held sufficient to preserve the constitutional question for decision by the Supreme Court of Illinois.

II-III.

The 1931 amendment to the Illinois State Parks Act, set forth in the Appendix, giving the Department authority to condemn property for state parks upon a subjective test of "unusual scenic attractions" makes the statute vague and indefinite. This defect in the statute is not cured by the provision for a legislative appropriation because such appropriation is general in terms ["for lands", without describing them], so that the appropriation statute does not constitute a legislative determination establishing and locating a state park. The attempted delegation of legislative power without any definite test for its exercise is violative of the due process clause of the Fourteenth Amendment.

I.

The Court below erred in refusing to decide whether Amended section 2 of the Illinois State Parks Act violates the Due Process Clause of the Fourteenth Amendment.

We recognize that if the state practice requires a Federal constitutional question to be raised in the trial court in

order to be preserved for review in the highest court of the state that such a procedural rule is binding and its enforcement presents no Federal question for review in this court. *Pennsylvania Railroad Co.* v. *Illinois Brick Co.*, 297 U.S. 447, 463 (1936). However, we submit that in the present case the constitutional question was presented to the trial court by the motion to dismiss and therefore the Illinois Supreme Court erred in refusing to pass upon it.

The Illinois Supreme Court recognized that under its practice any challenge to the statutory authority of the condemning body must be made by motion to dismiss the petition in the trial court and determined by that Court, citing *Bierbaum* v. *Smith*, 317 Ill. 147 (1925) (R. 202, 206). A recent case to the effect that the trial court, preliminary to the jury trial, must determine the authority to condemn is *Board of Education of Cicero-Stickney Township High School* v. *City of Chicago*, 402 Ill. 291, 298 (1949), already mentioned above, which cited *Department of Public Works and Buildings* v. *Lewis*, 344 Ill. 253, 255 (1931) for the proposition that (p. 298):

> "The only issue to be tried by the jury is the amount of compensation to be awarded. A defendant has a right to contest the petitioner's right to condemn, which he may do by a motion to dismiss, and having done so the burden is on the petitioner to maintain its right by proper proof."

In the *Lewis* case, it was held error to submit to the jury any question of fact upon which the right to condemn depended. Thus, it is clear that the challenge to the right of a public body to condemn, whether based upon questions of fact or questions of law, is to be submitted to the trial judge by a defendant's motion to dismiss the petition.

This Court held in *Gibbs* v. *Burke*, 337 U.S. 773 (1949), a habeas corpus case, that a mere misdescription of the amendment relied upon did not vitiate the contention that

state action (in that case, alleged denial of counsel) was a violation of the Federal Constitution. In that case, the petitioner relied upon the Sixth Amendment, although the Fourteenth was the proper one and the one upon which this Court reversed the court below. In the present case petitioners mentioned the Fifth Amendment in their petition to dismiss. This Amendment is obviously inapplicable to a state statute, but this ground was stated in the conjunctive. This reference to the Fifth Amendment did not limit or control the statement in the same paragraph, "(12)", that "condemnation of defendant's property is the taking of property without due process of law" and did not limit the further statement in paragraph "(16)" that the 1931 Amendment to the State Parks Act "was not properly passed and is null and void" (R. 13). The reference to the Fifth Amendment may therefore be treated as surplusage.

A reading of the motion to dismiss (R. 12-13) will show that the motion was no more specific with respect to the Federal constitutional question of due process which the Supreme Court of Illinois passed upon than it was with respect to the Federal constitutional question of due process which the Court refused to decide. The court held (R. 203-204; 408 Ill. 41, 48) that the absence of enabling legislation authorizing the Department to condemn specific real estate "does not cause the action brought to be violative of the due process clauses of our State and Federal constitutions". This holding depended upon an assumption that the delegation of power in the 1931 amendment set out in the appendix was a valid delegation of power, and we submit that the holding was in effect a decision of the very constitutional question which the court stated it would not pass upon. In any event, the two points are clearly interrelated and one point can hardly be decided without deciding the both. If the absence of specific enabling legis-

lation is excused because there has been a delegation of legislative power to the Department, then the absence of such legislation cannot be excused if the delegation of power is an invalid, unconstitutional one.

Under previous Illinois cases, the challenge made by the motion to dismiss in our case was sufficient to preserve the constitutional question for decision by the Supreme Court of Illinois. In *Christy* v. *Elliott,* 216 Ill. 31 (1905), approved in *Heine* v. *Degen,* 362 Ill. 357, 364-365 (1936), the stated ground for a new trial ("The court erred in the giving of instruction for plaintiff No. 1, as the act of 1903 to regulate the speed of automobiles was void") was held sufficient to preserve in the Illinois Supreme Court the constitutional argument that the statute was class legislation violative of the due process clause of the state constitution. The grounds set forth in our motion to dismiss, already mentioned, are more specific than the ground in the *Christy* case.

For the above reasons, we respectfully submit that the decision of the Supreme Court of Illinois in the present case should be treated as an adverse decision of the Federal constitutional question, subject to review in this Court, and not as a refusal to decide the constitutional question based upon adequate non-Federal grounds.

II-III.

The authority to condemn lands which have "unusual scenic attractions" is so vague, indefinite and uncertain that the Statute is unconstitutional and void.

The Department alleged below in its amended petition that it had the authority to condemn the land in question because it "has unusual scenic attractions caused by geologic and topographic formations such as canyons, gorges, caves, dunes, beaches, moraines, palisades and various points of

scientific interest both to botanists and naturalists" (R. 6). This allegation of the Respondent was based on Section 2 of the State Parks Act, as amended, which is set forth in the Appendix.

The position taken by these Petitioners in the state courts below and the position which they now take in this Court is that the said section of the State Parks Act is vague, indefinite and uncertain; that it does not specify the terms and conditions upon which the power of eminent domain may be exercised by the Department; that men of common intelligence must necessarily guess as to its meaning and differ as to its application; that it cannot be ascertained from it what the legislature intended; that the said section subjects the property rights of the Petitioners to the arbitrary action of public officials; and that the amended statute therefore deprives the Petitioners of their property without due process of law in violation of the Fourteenth Amendment of the Federal Constitution and by virtue of said constitutional provisions is unconstitutional and void (R. 13, 170-171, 183-186, 196-197, 217-221).

As has been shown above, the Supreme Court of Illinois was erroneously of the opinion that this constitutional question had not been presented to the trial court and therefore refused to consider it (R. 205). We shall in this section of our petition treat the refusal of the Supreme Court of Illinois to pass upon the constitutionality of Section 2 of the State Parks Act as a denial of the Petitioners' contentions.

It appears to us that in considering this constitutional question it must be kept in mind at all times that the right of property is a fundamental and inalienable right the protection of which is one of the most important objects of government. It is, of course, equally basic that the right of the state under its power of eminent domain, which power

may be exercised by those to whom it has been *lawfully* delegated, to condemn private property for public use and to appropriate the ownership or possession of such property for such use upon paying the owner just compensation is superior to all rights of private property. But the power to take from a citizen his property without his consent, by process of law, for public use is a power fraught with grave responsibility. The power is arbitrary in character and subversive of the rights of private property and before it may be exercised by an officer of the government its delegation to such officer must be in clear and unambiguous language. Statutes purporting to delegate this power have always been construed with strictness and in favor of the property owner so that no citizen should be deprived of the use and enjoyment of his land except by a valid exercise of the appropriating power subject to which all private property is held.

The exercise by a state of the power of eminent domain is subject to the requirement of due process of law found in the Fourteenth Amendment to the Constitution of the United States. *Chicago, B. & Q. Ry. Co.* v. *City of Chicago,* 166 U.S. 226 (1896).

It is now well established, even by the cases hereinafter relied on, that there is no constitutional objection to the legislature committing certain matters to the discretion of administrative officers. However, if the legislature is to avoid a delegation of essentially legislative power to administrative authorities, a statute vesting power in such officers must be complete in all its terms and provisions so that nothing in the matter of determining what the law may be is left to the judgment of the delegate of the power. The legislature must declare the policy or purpose of the law and fix the legal principles which are to control in given cases by setting up standards or guides to indicate the extent, and prescribe the limits, of the discretion which

may be exercised under the statute by the administrative officers. We do not mean by this that the legislature must state with great detail and particularity its policy and standard and deal directly with the many details in the numerous and complex problems on which it legislates. This would, of course, be impossible in many cases and in most cases would result in a loss of the flexibility which is necessary to the proper function of the administrative agencies created by the state. However, it is entirely possible to require that the legislature prescribe an intelligible standard so that the limits of the power delegated are reasonably clear and so that there is some standard by which it may be determined whether or not the power is being abused.

The statute here questioned gives to the Department the power to set aside as public reservations those lands which have "unusual scenic attractions". We submit that the scope of this phrase is so subjective, unlimited, vague and indefinite as to be no standard at all. It is a mental reaction, not a characteristic of the land. The reaction will vary with each individual. The property in question may be attractive to some and not to others. We further submit that the phrase "unusual scenic attractions" does not confine the subject matter of the investigation to any element essentially inherent in the land or the location. What is the test to be applied to determine if there has been an abuse of discretion?

The language of the statute here in question leaves the question open to the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can predict. Clearly the legislature has not prescribed the terms and conditions upon which this power of eminent

domain is to be exercised. The legislature has left to a ministerial officer the definition of the things to which the statute is to be applied.

The right to exercise the power of eminent domain is made dependent upon the taste and aesthetic sense of the director of the Department of Public Works and Buildings. In the first instance he would place his own construction on the general language of the statute without any objective test laid down by the legislature. The statement of the Supreme Court of Illinois in its opinion that "it is for the courts to decide whether the statutory conditions authorizing the exercise of the power of eminent domain exist" (R. 202), does not solve the problem because the statute itself lays down no definite test. Any court review of the departmental determination that particular lands comply with the statute is simply a substitution of a judge's aesthetic sense for that originally exercisable by the director of the Department. This follows because the statute itself lays down no test which is definite and specific.

It is a fundamental principle of our system of government that the rights of men are to be determined by the law itself and not by the let and leave of administrative officers of bureaus. This principle ought not to be surrendered for convenience, or in effect be nullified for the sake of expediency. Accordingly, such laws as the one now in question have consistently been declared by this Court to be unconstitutional under the due process clause.

In *Panama Refining Company* v. *Ryan*, 293 U. S. 388 (1935) this Court held that the legislative power was unconstitutionally delegated by the provisions of the National Industrial Recovery Act authorizing the President to prohibit under penalty of fine or imprisonment the transportation in interstate and foreign commerce of petroleum withdrawn from storage in excess of the amount permitted

by any state law. Mr. Chief Justice Hughes in delivering the opinion of the Court stated at page 421:

> "The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility. But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained."

The Court after reviewing a number of cases which involved the question whether certain delegations were unconstitutional went on to state at page 430 as follows:

> "Thus, in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that section 9 (c) goes beyond those limits. As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.

> "If section 9 (c) were held valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law-making function. The reasoning of the many decisions we have reviewed would be made vacuous and their distinctions nugatory. Instead of performing its law-making function the Congress could at will and as to such subjects as it chooses transfer that function to the President or other officer or to an administrative body. The question is not of the intrinsic importance of the particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of government."

In *A. L. A. Schechter Poultry Corp.* v. *United States,* 295 U. S. 495 (1935), section 3 of the National Industrial Recovery Act was held to be unconstitutional on substantially the same grounds as in the *Panama Refining Company* case, above. Mr. Chief Justice Hughes again delivering the opinion of the Court stated at pages 537-538:

> "The question, then, turns upon the authority which section 3 of the Recovery Act vests in the President to approve or prescribe. If the codes have standing as penal statutes, this must be due to the effect of the executive action. But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry."

And at pages 541-542:

> "To summarize and conclude upon this point: section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative under-

taking, section 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section 1. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power."

Yakus v. *United States*, 321 U. S. 414 (1944) involved among other things the question whether the standards set by the Emergency Price Control Act for the fixing of maximum prices of commodities by the Administrator were sufficiently definite to avoid the constitutional objection of an unlawful delegation of legislative power to him. In holding that the standards were sufficiently definite the Court stated at page 426:

"Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would be justified in overriding its choice of means for effecting its declared purpose of preventing inflation.

"The standards prescribed by the present Act, with the aid of the 'statement of considerations' required to be made by the Administrator, are sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the Administrator, in fixing the designated prices, has conformed to those standards."

Under the Illinois statute involved here, no provision is made for submission of the plans of the Department to the legislature as a condition precedent to an appropriation, no certain method of adopting a plan for a state park

is laid down, no statement of considerations upon which the Department has acted is required, and a landowner is faced in a condemnation suit with an *ex parte* determination wholly within the confines of the Department that the landowner's property ought to be used for a state park.

United States v. *Cohen Grocery Co.*, 255 U. S. 81 (1921), held invalid the Lever Act of World War I which made it unlawful to make any "unjust or unreasonable rate or charge" for necessaries. The Court said in holding that the statutory test was too vague and indefinite to be valid (p. 89):

> "The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question; that is, whether the words, 'That it is hereby made unlawful for any person wilfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries,' constituted a fixing by Congress of an ascertainable standard of guilt, and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."

Weeds v. *United States*, 255 U. S. 109 (1921) applied the *Cohen Grocery Co.* case and held that the Lever Act could not support a criminal conspiracy charge "to exact excessive prices" for necessaries.

An effort was subsequently made to distinguish the rule applicable to the above two criminal cases from the rule applicable in a civil case, but in *A. B. Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233 (1925), this Court held (p. 239):

> "The ground or principle of the decisions [*Cohen Grocery Co.* and *Weeds* cases, *supra*] was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all."

The doctrine of the *A. B. Small* case—that a statute must be definite and certain in civil as well as in criminal cases—was confirmed in *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 463 (1927) involving an anti-trust statute of the State of Colorado.

Connally v. *General Construction Co.*, 269 U. S. 385 (1926) held that an Oklahoma statute prohibiting (by criminal penalties) contractors on public works from paying laborers less than the "current rate of per diem wages in the locality where the work is performed" violated the due process clause of the Fourteenth Amendment.

This Court said in part (pp. 391-392):

> "And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential

of due process of law. *International Harvester Co.* v. *Kentucky,* 234 U. S. 216; *Collins* v. *Kentucky,* 234 U. S. 634.

"The question whether given legislative enactments have been thus wanting in certainty has frequently been before this court. In some of the cases the statutes involved were upheld; in others, declared invalid. The precise point of differentiation in some instances is not easy of statement. But it will be enough for present purposes to say generally that the decisions of the court upholding statutes as sufficiently certain rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497; *Omaechevarria* v. *Idaho,* 246 U. S. 343, or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, *Nash* v. *United States,* 229 U.S. 373, 376; *International Harvester Co.* v. *Kentucky, supra,* p. 223, or as broadly stated by Mr. Chief Justice White in *United States* v. *L. Cohen Grocery Co.,* 255 U. S. 81, 92, 'that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.' See also *Waters-Pierce Oil Co.* v. *Texas,* 212 U. S. 86, 108. Illustrative cases on the other hand are *International Harvester Co.* v. *Kentucky; Collins* v. *Kentucky;* and *United States* v. *L. Cohen Grocery Co., supra* and cases therein cited. The *L. Cohen Grocery Co.* case involved the validity of § 4 of the Food Control Act of 1917 [40 Stat. at L. 277, chap. 53], which imposed a penalty upon any person who should make 'any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries.' It was held that these words fixed no ascertainable standard of guilt, in that they forbade no specific or definite act.

"Among the cases cited in support of that conclusion is *United States* v. *Capital Traction Co.,* 34 App. D. C. 592, 19 Ann. Cas. 68, where a statute making it an offense for any street railway company to run an

insufficient number of cars to accommodate passengers 'without crowding', was held to be void for uncertainty. In the course of its opinion, that court said (pp. 596, 598):

" 'The statute makes it a criminal offense for the street railway companies in the District of Columbia to run an insufficient number of cars to accommodate persons desiring passage thereon, without crowding the same. What shall be the guide to the court or jury in ascertaining what constitutes a crowded car? What may be regarded as a crowded car by one jury may not be so considered by another. What shall constitute a sufficient number of cars in the opinion of one judge may be regarded as insufficient by another. . . There is a total absence of any definition of what shall constitute a crowded car. This important element cannot be left to conjecture, or be supplied by either the court or the jury. It is of the very essence of the law itself, and without it the statute is too indefinite and uncertain to support an information or indictment.' "

Just as the words "without crowding" in the above ordinance defy accurate definition, the words "unusual scenic attractions" in the Illinois statute involved in the case at bar are conjectural and uncertain. As the dissenting justice said in the court below, the statute as construed by that court leaves to the Department of Public Works and Buildings the judgment of what has unusual scenic attraction and makes the acquiring of land for park purposes dependent upon the artistic predilections or the historic inclinations of the head of the Department.

Lanzetta v. *New Jersey*, 306 U. S. 451 (1939) held invalid under the Fourteenth Amendment a New Jersey anti-gangster statute imposing criminal penalties upon "any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more per-

sons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or in any other State."

After discussing the vagueness of the terms of the statute, this Court held (p. 458):

> "The challenged provision condemns no act or omission; the terms it employs to indicate what it purports to denounce are so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment."

Previous decisions of the Illinois Supreme Court have held to be invalid—as violations of due process—delegations of legislative power no less specific, containing standards no less exact, than the 1931 amendment to the State Parks Act.

In *Welton* v. *Hamilton*, 344 Ill. 82(1931), a delegation of power to vary a zoning ordinance "where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of such ordinance" was held invalid. The court said (p. 93):

> "The statute gives no direction, furnishes no rule and provides no standard for determining what are practical difficulties or unnecessary hardships which justify setting aside the provisions of the ordinance and varying or modifying their application but leaves those questions to be determined by the unguided and unlimited discretion of the board. 'Practical difficulties' and 'unnecessary hardship' are not well defined and understood terms having a specific meaning which would enable an average person of ordinary intelligence to apply the tests of 'practical difficulty' and 'unnecessary hardship' to any particular case."

In the present case we submit that "unusual scenic attractions", the key phrase in the statement of "policy" regarding the establishment of state parks, is not a phrase

having a meaning any more specific than the terms "practical difficulty" and "unnecessary hardship" which were held too vague to be constitutionally valid in the *Welton* case.

In *Baim* v. *Fleck*, 406 Ill. 193 (1950) the constitutionality of section 24 of Article VI of the Illinois Liquor Control Act was challenged. Said section 24 provided:

> "No person or persons licensed to sell liquor at retail for consumption on the premises shall use in such sales or possess on such premises any glass or other container so constructed as to be deceptive in appearance or to mislead the customer as to its true capacity."

Plaintiff's attack was based in part on the contention that the provisions of section 24 are so vague and indefinite that persons subject to the act cannot ascertain whether the use of any particular container will render them liable to the penalties. In holding that the said section was unconstitutional the Illinois Supreme Court stated at pages 199-200:

> "It is axiomatic that a statute, to be valid, must not be vague, indefinite and uncertain. It must be sufficiently explicit to advise those whom it purports to affect as to what their rights are and how they will be affected by its operation. Statutes which are so incomplete, vague, indefinite and uncertain that men of ordinary intelligence must necessarily guess at their meaning and differ as to their application, will not be upheld by the courts. (*Ill. Liquor Control Com.* v. *Chicago's Last Liquor Store*, 403 Ill. 578; *Krebs* v. *Thompson*, 387 Ill. 471, 477.) Applying this rule to the present provisions, it is apparent that they fail to satisfy its requirements. The phrases 'deceptive in appearance' or 'misleading as to capacity' convey no precise guide which the citizen can follow with any assurance that he is complying with the law. The determination of whether a particular glass is so con-

> structed as to be deceptive in appearance or to mislead the consumer as to its true capacity must, in many cases, be wholly conjectural, and susceptible to differing answers by persons of ordinary intelligence."

The words "deceptive in appearance" or "misleading as to capacity" in the above statute were no less definite and certain than "unusual scenic attractions" in the 1931 amendment to the Illinois State Parks Act.

If section 2 of the State Parks Act be held unconstitutional then the Department of Public Works and Buildings has unlimited authority to condemn land and establish new parks without legislative action. The fact that the legislature must eventually appropriate funds to pay for the land so condemned does not alter the situation. The 1947 Appropriation Act (pertinent parts of which are set forth in the appendix) which may constitutionally cover expenses of the government up to the expiration of the first fiscal quarter after the biennium, September 30, 1949, (Illinois Constitution 1870, Article IV, section 18), shows a blanket appropriation "For Land" in the amount of $100,000.00. Article IV, Section 18 of the Constitution of Illinois of 1870 provides that "all appropriations, general or special, requiring money to be paid out of the state treasury, from funds belonging to the state, shall end with such fiscal quarter." The condemnation judgment in the present case was entered June 22, 1949 (R. 27). Payment for the subject lands must therefore come either from the 1947 or 1949 Appropriation Acts, both of which make blanket appropriations "For Land", the only difference being that the 1949 act is for the sum of $50,000.00.

There is no evidence whatever that the legislature in making either the 1947 or 1949 appropriations knew of or intended to ratify the condemnation of petitioners' lands for state park purposes. It cannot be said that said Ap-

propriation Acts ratified and approved the acts of the Department in condemning the land in question, nor can the Acts be said to ratify the acquisition of any particular piece of land. The appropriations are just "For Land" without any specification as to what land, or where it is located or how much land is involved. The conclusion is inescapable both that the legislature has abdicated in the first instance and that the requirement of an appropriation is an illusory check which furnishes no assurance of an eventual decision by the legislature whether a particular state park site is approved. As so well stated by Mr. Justice Gunn, dissenting below, the selection of land to be condemned (which is a legislative question) depends "entirely upon the artistic predilections, or the historic inclinations of the head of the Department."

CONCLUSION.

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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March 26, 1951.

(Appendix follows)

APPENDIX.

The Amendatory Act of 1931 to the Illinois State Parks Act is as follows (Ill. R. S., 1949, chap. 105, "Parks", par. 466):

AN ACT *to amend section 2 of "An Act in relation to acquisition, control, maintenance, improvement and protection of State parks," approved June 26, 1925, as amended.*

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Section 2 of "An Act in relation to the acquisition, control, maintenance, improvement and protection of State Parks," approved June 26, 1925, as amended, is amended to read as follows:

§ 2. It shall be the policy of the State of Illinois to acquire a system of State parks which shall embody the following purposes and objectives:

(1) To preserve the most important historic sites and events which are connected with early pioneer or Indian history, so that such history of the Indians, explorers, missionaries and settlers may be preserved, not only as a tribute to those who made possible the building of the State of Illinois and of the Union, but also as a part of the education of present and future Illinois citizens.

(2) To set aside as public reservations those locations which have unusual scenic attractions caused by geologic or topographic formations, such as canyons, gorges, caves, dunes, beaches, moraines, palisades, examples of Illinois prairie, and points of scientific interest to botanists and naturalists. These areas should be large in size and whenever practicable shall be not less than 1,000 acres in extent. However, smaller areas may be acquired wherever conditions do not warrant the acquisition of the larger acreage.

(3) To preserve large forested areas and marginal lands along the rivers, small water courses, and lakes for a recreation use different from that given by the typical city park, and so that these tracts may remain unchanged by civilization, so far as possible, and be kept for future generations. Such areas also, should be acquired in units of 1,000 acres or more and may be available as fish and game preserves. However, smaller areas may be acquired wherever conditions do not warrant the acquisition of the larger acreage.

(4) To connect these parks with each other by a system of scenic parkways with widths varying from 100 to 1000 feet, as a supplement to and completion of the State highway system. Where the present State highway routes may serve this purpose, their location, alignment and design should be studied with this plan in view. At suitable locations along these parkways, pure water supplies and shelters and comfort facilities of attractive design may be installed for the convenience of the public.

The Department of Public Works and Buildings is authorized in behalf of the State of Illinois to accept by donation or bequest, to purchase or acquire by condemnation proceedings under the Eminent Domain Act, or in any other legal manner, the title to all such lands, waters or regions, and the easements appurtenant or contributory thereto, which shall be in accord with such policy in respect to a system of State parks, for the purpose of which the General Assembly may make an appropriation.

Approved July 3, 1931.

The 1947 Appropriation Act approved June 30, 1947 and covering the period to September 30, 1949 [the condemnation judgment in the present case was entered June 22, 1949 —R. 27] originated as House Bill 554, entitled "AN ACT to provide for ordinary and contingent expenses of the De-

partment of Public Works and Buildings". The pertinent portion showing the form of the appropriation for lands is as follows (L. 1947, pp. 178, 179):

> Section 1. The following named sums, or so much thereof as may be necessary, respectively, for the objects and purposes hereinafter named, are appropriated to meet ordinary and contingent expenses of the Department of Public Works and Buildings.
>
> * * *
>
> General Office
>
> * * *
>
> Division of Parks and Memorials
>
For Personal Services:	
For regular positions	$609,347
For extra help	440,000
(Total, personal services, $1,049.347)	
For Contractual Services	$331,328
For Office Expenses	3,672
For Travel	35,000
For Commodities	200,000
For Equipment	180,000
For Land	100,000
For Permanent Improvements and Major Repairs	175,000
For the Maintenance of Woodland Park, Chicago	800
For Equipment, Maintenance and Operation of Parks Acquired 1947-1949	25,000
Total, Division of Parks and Memorials	$2,100,147

The 1949 Appropriation Act approved June 30, 1949 covering the period to September 30, 1951 originated as Senate Bill 515. It is similar in outline to the 1947 Appropriation Act with respect to the appropriation "For Land" but the amount appropriated is $50,000 instead of the previous $100,000. (L. 1949, p. 189).